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Supreme Court of the United States

OCTOBER TERM, 1933

No. [redacted] 1

THOMAS M. LYNCH, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners Constituting The State Tax Commission of the State of New York,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation of ELIZABETH PIERSON,

Respondent.

BRIEF FOR THE RESPONDENT

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Supreme Court of the United States

OCTOBER TERM, 1933

No. 831

THOMAS M. LYNCH, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners Constituting The State Tax Commission of the State of New York,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation of ELIZABETH PIERSON,

Respondent.

BRIEF FOR THE RESPONDENT

Official Reports of Opinions Delivered.

The opinion of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, is reported in 237 App. Div. 763.

The affirmance, without opinion, is reported in 263 N. Y. 533.

Statement of Case.

The respondent instituted a certiorari proceeding under the provisions of the Tax Law of the State of New York (Sections 375, 199) to review a determination of the State Tax Commission assessing an additional income tax against the relator for the Calendar Year 1928. The order of the Appellate Division, Third Judicial Department, included the annulment of the determination of the State Tax Commission imposing an income tax on rentals from Ohio real estate (R. 18-21). The petitioners appealed to the Court of Ap-

peals from so much of the order of the Appellate Division as annulled such determination.

In 1928 the relator, a native of Ohio, residing in New York, received rental income of $2,223.72 from some Cincinnati real estate inherited from her father (R. 15, 16). She did not include these rentals as taxable income in her New York State Income Tax Return, claiming that they were not taxable by the State of New York (R. 10b, Exhibit 2). The State Tax Commission ruled that they were taxable and assessed a tax of 2% upon these specific rentals (R. 12a, Exhibit 4). The Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, annulled the assessment and held that the rental income in question might not be included by the State of New York as a part of the relator's income for the purposes of income tax (237 App. Div. 763). The final order was unanimously affirmed by the Court of Appeals without opinion (R. 23, 24; 263 N. Y. 533).

Summary of the Argument.

The record does not show that a Federal question was expressly or necessarily decided by the State Court.

A tax upon the rentals from real estate is in substance and effect a tax upon the real estate.

Under the Federal Constitution a State of the Union may not exact a tax which constitutes, in substance and effect, a tax on tangible property situated in another State. Such an exaction would violate the due process clause of the Fourteenth Amendment.

I.

The record does not show that a federal question was expressly or necessarily decided by the state court.

It does not affirmatively appear that the Appellate Division of the New York Supreme Court, Third Judicial Department, passed upon the federal question on which counsel for the petitioners based the application for the writ, or that the decision of any federal question was necessary to the decision in this case.

Mellon v. *O'Neil,* 275 U. S. 212.

The petitioners state (Brief in Support of Petition, p. 6) that,

> "Jurisdiction is conferred on this Court by Section 237 of the Judicial Code, as amended by Act of Feb. 13, 1925, c. 229, § 1, 43 Stat. 937 (§ 344, Title 28, U. S. C. A.) and Act of February 13, 1925, c. 229, § 8, 43 Stat. 940, (§ 350, Title 28, U. S. C. A.)."

Section 237, so far as here relevant, reads as follows:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States; or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of * * * the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied * * *."

We maintain that:

(1) There was not drawn in question in this proceeding the validity of any statute on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or on any other ground. There is nowhere in the record any holding that the New York Tax Law is in any respect invalid;

(2) There was not in this proceeding either sustained or denied any title, right, privilege or immunity set up or claimed by either party under the Constitution, or any treaty or statute of the United States.

The petitioners include in their Specification of Errors (Brief in Support of Petition, pp. 6-7), the following:

"2. The Court of Appeals erred in holding that the imposition of the New York income tax upon a resident with respect to income derived from rentals of real property situated in another State, was a taking of property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution," and

"5. The Court of Appeals erred in holding that § 351 New York Tax Law, as here applied, was violative of the Fourteenth Amendment."

We submit that the Court of Appeals made neither of the determinations above recited. The only determination made by that Court, as reported in 263 N. Y. 533, 534, consists of six words, as follows:

"Order affirmed, with costs; no opinion."

Nor did the Appellate Division of the Supreme Court of New York make either of such determinations. What that Court actually held, as appears in the Opinion of Presiding Judge HILL (Transcript of Record, p. 19) was:

> "The rental income from this real property located in Ohio may not be included by the State of New York as a part of relator's income for the purposes of the income tax."

There is no suggestion in that language that the Appellate Division, in order to arrive at that conclusion, held that the statute under consideration was in any respect invalid. Here was a local statute of the State of New York, construed by the petitioners, constituting an administrative body of the State of New York, to be so broad in its terms that it included the rentals in question, and construed otherwise by the Appellate Division.

It has been held repeatedly by this Honorable Court, that the meaning attributed by the highest court of a State to a statute of the State must be accepted by this Court, on review, as though it had been specifically expressed in the statute. In *Supreme Lodge, Knights of Pythias* v. *Meyer,* 265 U. S. 30, this Court said, at pages 32-3:

> "Under the settled rule of this Court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the State fixing the meaning of the state legislation, as though such meaning had been specifically expressed therein (citing authorities). And we follow the state construction even though it may not agree with our own opinion."

We submit that while the petitioners were of the opinion that the meaning of the words "entire net income" was broad enough to include the rental income from the real property located in Ohio, the Appellate Division was of the opinion that such was not their meaning, and we assume that this Court will accordingly, in conformity with its settled rule, accept the meaning determined by the State Court.

It has also been held repeatedly by this Honorable Court in a long line of cases such as *Williams* v. *Oliver* (Md. 1851), 43 U. S. (12 How.) 111, and numerous others, that in order to give this Court jurisdiction on writ of error to the highest court of a state in which a decision could be had, it must appear affirmatively not only that a federal question was presented for decision by the highest court of the state having jurisdiction but that the decision of the federal question was necessary to the determination of the cause, that it was actually decided, or that the judgment as rendered could not have been given without deciding it, and where the decision complained of rests on independent grounds not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this Court without considering any federal question that may also have been presented.

In *Consolidated Turnpike Company* v. *Norfolk & Ocean View Railway Company,* 228 U. S. 596, it was held that where the judgment of the state court rests upon a question of general law broad enough to support the decision, this Court will not consider the federal question, although it may have been raised in and passed upon by the court below.

It is true that the Appellate Division's opinion refers to the Fourteenth Amendment, *arguendo,* but our contention is that to reach the conclusion that rentals from real estate located outside the State of New York were not to be taxed it was not necessary to have recourse to the Amendment.

We maintain that the decision of the Federal question presented herein was not necessary to the determination of the cause. The Federal question whether or not the *imposition* of the tax by the petitioners violated the taxpayer's rights under the Fourteenth Amendment was presented but a decision of that question was not necessary to the determination of the cause. The Appellate Division held that the thing taxed was without the jurisdiction of the State and therefore was

not to be included in determining the "entire net income" taxed by the statute. There was no suggestion that the Court held that it could not be included only because of the Fourteenth Amendment, or that but for the barrier of that amendment the Legislature would have intended to include it. We submit that there is nothing to indicate that the Appellate Division would have arrived at a different conclusion if there were no such barrier in existence as the Fourteenth Amendment, and that the ground upon which the decision was actually based was the ground above stated, an independent ground not involving a Federal question and broad enough to maintain the judgment.

If the statute under consideration by the New York courts in this case had attempted in express terms to impose a tax on rentals derived from real estate located in another state, then it would have been necessary for the State Courts to have declared it an unconstitutional attempt to impose a tax. The State statute does not, however, contain any language in terms imposing a tax on rentals derived from real property outside the State. It should not be presumed that the State intended to attempt to tax property located outside its jurisdiction any more than it would be presumed that the Legislature of the state, in imposing a tax upon the "entire net income" of a resident of the State, intended to impose a tax on any other non-taxable income such as, for instance, income from United States Government bonds. All that was decided by the State Courts in the instant case was, in effect, that the statute in question should not be so construed as to attribute to the Legislature an attempt to tax property beyond the jurisdiction of the State.

The respondent submits that in the absence of any of the requisites prescribed in Section 237, *supra,* that is, where no question has been presented as to the validity of the New York statute, where the issue as to the Fourteenth Amendment was neither sustained nor denied, and where the judgment sought to be reviewed herein was rendered in accord-

ance with general principles of law not involving any Federal question, this Honorable Court is without jurisdiction herein, and the case should be dismissed for the want of a Federal question.

II.

A tax upon the rentals from real estate is in substance and effect a tax upon the real estate.

Pending the decision of this Honorable Court as to its jurisdiction herein, the respondent respectfully submits the following argument on the merits.

There are various theories as to the nature of an income tax. At one time or another it has been said to be

> A tax on the person measured by the income received;
>
> A tax on the property from which the income is derived;
>
> A tax on the income itself as property;
>
> An excise on the privilege of receiving income (see discussion and cases cited in 42 Yale Law Journal, 283-284).

We deem it unnecessary to discuss these theories or attempt to choose between them, because our argument under this Point does not depend on any one of them. As said by this Court in reply to an argument that an income tax is in its nature a personal tax rather than a property tax:

> "This argument, upon analysis, resolves itself into a mere question of definitions, and has no legitimate bearing upon any question raised under the Federal Constitution. For, where the question is whether a state taxing law contravenes rights secured by that instrument, the decision must depend not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed" (*Shaffer* v. *Carter*, 252 U. S. 37, at p. 55).

The decision of this Court in the so-called "Income Tax Cases" (*Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 580; same case on rehearing, 158 U. S. 601, 629) is directly in point upon the proposition that a tax on rentals is in substance and effect a tax on the land. The question was whether the constitutional inhibition against a direct tax on land unless apportioned among the States applied also to a tax upon the income from land.

The Court said (157 U. S. at p. 581):

> "An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income."

And on rehearing (158 U. S. p. 630):

> "We have unanimously held in this case that, so far as this law operates on the receipts from municipal bonds, it cannot be sustained, * * * it follows that, if the revenue derived from municipal bonds cannot be taxed because the source cannot be, the same rule applies to revenue from any other source not subject to the tax; and the lack of power to levy any but an apportioned tax on real and personal property equally exists as to the revenue therefrom."

Petitioners' efforts to distinguish this case (see Point II of Brief for Petitioners in Support of Petition for Writ of Certiorari) do not seem to us successful. True, the question was whether the tax on rental income was a direct tax, but the reason assigned (and the only possible ground) for holding that it was a direct tax was that it was in substance and effect a tax on the land. Petitioners themselves seem so doubtful whether the *Pollock* case can be distinguished that in the State courts they fell back on the argument that the decision is thirty-eight years old, conditions have changed, and it is time for a new and different determination.

The *Pollock* case is by no means the only authority for our proposition. This Court has repeatedly held in other cases that a tax upon net income received from non-taxable property is in effect a tax upon the property itself. A number of such cases are cited in the *Pollock* case (157 U. S. at p. 581 *et seq.*). For later decisions, see, e. g.,

Gillespie v. *Oklahoma,* 257 U. S. 501.

(Oklahoma state income tax upon net income derived by lessee from sales of oil and gas received under leases of restricted Indian lands held void as in effect a tax upon the leases.)

Northwestern Life Ins. Co. v. *Wisconsin,* 275 U. S. 136;
Natl. Life Ins. Co. v. *United States,* 277 U. S. 508;
Macallen Co. v. *Massachusetts,* 279 U. S. 620.

(Holding in substance that a state tax on the income of United States bonds is void because in effect a tax on the bonds themselves.)

The Supreme Court of Massachusetts has said (*Opinion of the Justices,* 220 Mass. 613, 624):

> "A tax upon the income of property is in reality a tax upon the property itself. Income derived from property is also property. Property by income produces its kind, that is, it produces property and not something different. It does not matter what name is employed. The character of the tax cannot be denied by calling it an excise and not a property tax. In the essence a tax upon income derived from property is a tax upon the property."

The proposition that a tax on rentals from real estate is in substance and effect a tax on the real estate, is implicit in statutes taxing income from local real estate owned by non-residents (e. g., N. Y. Tax Law, § 351) and in the decisions

(e. g., *Schaffer* v. *Carter,* 252 U. S. 37) upholding such taxes, for the real estate is the only thing within reach of the taxing power.

III.

Under the Federal Constitution a State of the Union may not exact a tax which constitutes, in substance and effect, a tax on tangible property situated in another state. Such an exaction would violate the due process clause of the Fourteenth Amendment.

The Supreme Court of New Hampshire in an advisory opinion has expressly so held (Opinion of the Justices, 84 N. H. 559, at p. 573; same case, 149 Atlantic Reporter 321, at pp. 328-329). The Court said:

> "The provision for the taxation of rents cannot be applied to rent paid for the use of real property situated outside the state, although the rent is received by a resident. It has always been the accepted rule that a state cannot lay a tax upon realty not within its jurisdiction. * * *
>
> "In *Pollock* v. *Company,* 157 U. S. 429; s. c. 158 U. S. 601, it was held upon great consideration that a tax laid upon rent is a direct tax upon the land out of which the rent issues. * * * While the question, whether a state could tax rent received for the use of realty over which the state had no jurisdiction, was expressly excluded from consideration in *Union, &c., Co.* v. *Kentucky, supra,* the logic of the later decisions points plainly to the conclusion that such a tax would be in violation of the provisions of the federal constitution. *Natl. Life Ins. Co.* v. *United States,* 277 U. S. 508; *Gillespie* v. *Oklahoma,* 257 U. S. 501.
>
> "We are of opinion that a state cannot tax income received as compensation for the use of either real estate or tangible personal property which has a *situs* outside the state."

This case appears to have been accepted by the text books as settling the law upon the subject (see e. g., 61 Corpus Juris 1562).

This Court has not yet had occasion to pass upon the question squarely. As noted by the New Hampshire Supreme Court the question was expressly excluded from consideration in *Union Transit Co.* v. *Kentucky,* 199 U. S. 194, 204. There can be little doubt, however, that the New Hampshire Court was right in saying that:

> "The logic of the later decisions points plainly to the conclusion that such a tax would be in violation of the provisions of the Federal Constitution."

A significant intimation in that direction is found in the recent case of *Cook* v. *Tait,* 265 U. S. 47. That case held that the Federal Government had power to impose exactly the kind of tax that we claim a state cannot impose, i. e., a tax on the income received by a citizen from property situated outside the jurisdiction. In so holding, however, the Court was careful to draw a distinction between national power and the power of a State. The Court said (at p. 55):

> "We may make further exposition of the national power as the case depends upon it. It was illustrated at once in *United States* v. *Bennett* by a contrast with the power of a State. It was pointed out that there were limitations upon the latter that were not on the national power. The taxing power of a State, it was decided, encountered at its borders the taxing power of other States and was limited by them. There was no such limitation, it was pointed out, upon the national power."

This language must, of course, be taken as referring to the question before the Court, i. e., the right to tax a resident on income from property situated outside the jurisdiction, otherwise it would be meaningless. That it was not a

random remark is clearly indicated by the opinion in *Burnet* v. *Brooks,* 288 U. S. 378, decided in March, 1933, where the Court, speaking through Chief Justice HUGHES, said (at p. 405):

> "This distinction between the limitations of state jurisdiction to tax and the broad authority of the Federal Government, was restated *and applied* in Cook v. Tait, 265 U. S. 47, 55, 56." (Italics ours.)

This Court has frequently decided, in cases involving taxes of other kinds, that the State of residence cannot reach by taxation, directly or indirectly, tangible property situated in another State.

In *Delaware, L. &c. R. R. Co.* v. *Pennsylvania,* 198 U. S. 341, it was held that a tax on the value of the capital stock of a domestic corporation was in substance and effect a tax on the property in which that capital was invested, and that the value of tangible property situated outside the State must be excluded, otherwise the tax would amount to the taking of property without due process of law in violation of the Fourteenth Amendment.

In *Union Transit Co.* v. *Kentucky,* 199 U. S. 195, it was held that the State of Kentucky could not tax a resident (a domestic corporation) upon tangible personal property permanently employed without the State; that:

> "An attempt on the part of the State in which the owner is domiciled to tax such property amounts to a deprivation of property without due process of law within the purview of the Fourteenth Amendment" (headnote).

In *Frick* v. *Pennsylvania,* 268 U. S. 473, it was held that the State of domicile (Pennsylvania) had no jurisdiction for purposes of taxation over tangible personal property situated outside Pennsylvania, notably Mr. Henry C. Frick's collection of art objects housed in New York City. The Court held (headnote):

> "A state statute attempting to tax the transfer of tangible personal property having an actual situs in other States transcends the power of the State so attempting and contravenes the due process clause of the Fourteenth Amendment."

As the case at bar involves tangible property only, it would be beside the point to discuss the interesting line of recent decisions in which this Court has announced the rule applicable to intangibles, holding that under the maxim *mobilia sequuntur personam* they have their taxable situs and are subject to State taxation only at the domicile of the owner. See, e. g.:

> *Safe Deposit & T. Co.* v. *Virginia,* 280 U. S. 83, 92;
> *Farmers Loan Co.* v. *Minnesota,* 280 U. S. 204, 210;
> *Baldwin* v. *Missouri,* 281 U. S. 586;
> *Beidler* v. *South Carolina,* 282 U. S. 1;
> *First National Bank of Boston* v. *State of Maine,* 284 U. S. 312.

However, these cases, while not directly in point, are significant as indicating what the New Hampshire Court called "the logic of the later decisions"—a determination to do away as far as possible with double taxation as between the States.

The whole subject of the distinction between National and State power and the growth in respect of State power of the "rule of immunity from taxation by more than one State" are so well summarized in the opinion of Chief Justice HUGHES in the recent case of *Burnet* v. *Brooks,* 288 U. S. 378, that we venture to quote somewhat at length. That was a case affirming the right of the National Government to tax intangibles (securities and bank accounts) owned by a non-resident alien. The Court took occasion to survey the field

of Federal and State jurisdictions, saying *inter alia* (288 U. S., p. 401, *et seq.*):

> "The limits of State power are defined in view of the relation of the States to each other in the Federal Union. The bond of the Constitution qualifies their jurisdiction. This is the principle which underlies the decisions cited by respondents. These decisions established that proper regard for the relation of the States in our system required that the property under consideration should be taxed in only one State and that jurisdiction to tax was restricted accordingly. * * * The principle has had a progressive application. In *Louisville & Jeffersonville Ferry Co.* v. *Kentucky,* 188 U. S. 385, the question related to a ferry franchise granted by Indiana to a Kentucky corporation, which Kentucky attempted to tax. Despite the fact that the tax was laid upon a property right belonging to a domestic corporation, the Court held that the Fourteenth Amendment precluded the imposition. *Id.,* p. 398. In *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, the principle was applied to the attempted taxation by Kentucky of tangible personal property which was owned by a domestic corporation but had a permanent situs in another State. The Court decided that where tangible personal property had an actual situs in a particular State, the power to subject it to state taxation rested exclusively in that State regardless of the domicile of the owner. * * * The decision in *Farmers Loan & Trust Co.* v. *Minnesota, supra,* overruling *Blackstone* v. *Miller,* 188 U. S. 189, carried forward the principle by applying it to intangibles. The Court was of the opinion that 'the general reasons declared sufficient to inhibit taxation of them (tangibles) by two States apply under present circumstances with no less force to intangibles with taxable situs, * * *. But it has been as decisively maintained that this principle, thus progressively applied in limiting the jurisdiction of the States to tax, does not restrict the taxing power of the Federal Government."

In this case it is not necessary to attack the constitutionality of the New York Tax Law but only the construction sought to be put upon that statute by the Tax Commissioners. While the language of Section 351 imposing an income tax on residents ("entire net income") is general in form, it should, under well recognized principles, be construed as relating only to matters within the jurisdiction of the law-making body. Section 351 is not the only provision of the New York Tax Law where this principle of construction must be applied. For example, Section 3 provides that "all personal property situated or owned within this State" is taxable, and Section 8 provides that "every person shall be taxed in the tax district where he resides * * * for all personal property owned by him or under his control." The language of these two sections is general, but no one supposes that it covers tangible property having a definite situs outside the State. See, e. g., *Hoyt* v. *Commissioners of Taxes*, 23 N. Y. 224.

The State of New York taxes the income from all taxable lands within its borders, including land owned by non-residents (Tax Law, § 351). Ohio has like power. If New York can also tax the income from lands in Ohio a wide field is opened for double taxation.

As between Nation and State double taxation is often unavoidable, because the two sovereignties cover the same persons and properties. As between two States of the Union the situation is different. They have separate and distinct jurisdictions, as regards both persons and property. For one to invade a field of taxation belonging primarily to the other, such as income from the other's lands, works injustice. The justification for a tax affecting property lies in the protection afforded by the taxing State to the property taxed. New York affords no protection to real estate situated in Ohio, or to the securing of rentals therefrom.

Petitioners urge that such a tax involves no injustice. They say (Petitioners' Brief, Point III):

> "In the instant case, the taxpayer chooses to reside in New York and enjoy here the fruits of property which she owns in Ohio. She has no justifiable complaint because New York and Ohio each ask her to contribute to the costs of government, since New York protects her in her person and Ohio lends its protection to her property."

The evils of double taxation as between the States have increasingly engaged the attention of this Court. In *Farmers Loan Co.* v. *Minnesota* (280 U. S. 204), which formally overruled the famous *Blackstone* case (*Blackstone* v. *Miller,* 188 U. S. 189), the Court pointed out that, while it and similar cases had held in effect that two States may tax the same subject matter without conflict with the Fourteenth Amendment,

> "The inevitable tendency of that view is to disturb good relations among the States and produce the kind of discontent expected to subside after establishment of the Union."

IV.

The decisions relied on to support the tax are not in point.

In *Maguire* v. *Trefry,* 253 U. S. 12, it was held that the State of Massachusetts could tax one of its residents upon income from a trust held and administered in the State of Pennsylvania. The trust estate consisted of intangibles (bonds and equipment trust certificates) and the taxpayer's interest therein was clearly taxable under the rule of *mobilia sequuntur personam.*

In *Lawrence* v. *State Tax Commission of Mississippi,* 286 U. S. 276, it was held that the State of Mississippi could

tax one of its residents upon income from work (the construction of highways) done in the State of Tennessee. The Court pointed out that the source of the income, an intangible, was itself taxable, saying (at p. 281):

> "It would be anomalous to say that although Mississippi may tax the obligation to pay appellant for his services rendered in Tennessee * * * still, it could not tax the receipt of income upon payment of that same obligation."

In *Cook* v. *Tait,* 265 U. S. 47, it was held that the Federal government has power to tax the income received by a native citizen of the United States from property situated abroad. The decision was based on the power possessed by the Nation over its citizens. The opinion contrasts this power with the power of a State, pointing out that there are limitations on the latter that are not on the national power.

Peck v. *Lowe,* 247 U. S. 165, involved a Federal tax and was decided upon considerations of construction, not power, the Court holding that a general non-discriminatory tax on income from an exporting business was not a "tax or duty * * * laid on articles exported from any State" within the meaning of the Constitution.

In certain decisions involving a state income tax upon income from interstate commerce a distinction has been drawn between gross income and net income "after all expenses were paid and losses adjusted and the recipient of the income was free to use it as he chose," and a tax upon the latter has been sustained (see e. g., *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321, 328). This distinction was discussed by Justice Holmes writing the opinion in *Gillespie* v. *Oklahoma,* 257 U. S. 501, and held to be based on considerations peculiar to interstate commerce. The Court went on to say (p. 505):

> "In cases where the principal is absolutely immune from interference"—and that is the situation

> of the Ohio real estate in the case at bar—"an inquiry is allowed into the sources from which net income is derived and if a part of it comes from such a source the tax is *pro tanto* void."

In *Shaffer* v. *Carter,* 252 U. S. 37, it is remarked (p. 57):

> "As to residents it (i. e., the State of Oklahoma) may, and does, exert its taxing power over their income from all sources, whether within or without the State," etc.

This remark was *obiter* and is no more authority for the proposition that a State may tax income from tangible property situated outside the State than it is for the proposition that a State may tax income from Federal salaries and Government bonds. Obviously, all the Court meant to say was that in the case of residents the State of Oklahoma taxes all income within the taxing power of the State, a proposition with which we have no quarrel.

Petitioners' brief quotes at length from *People ex rel. Central Union Trust Co.* v. *Wendell,* 197 App. Div. 131, affirmed without opinion 231 N. Y. 629. That decision is not in point, involving merely a question of statutory construction. Moreover, the opinion seems to support our position in this case. The Court said (197 App. Div. 135):

> "We are not unmindful that it has been held that a tax on income is in reality a tax on the property producing the income. (*Pollock* v. *Farmers' Loan & Trust Company,* 157 U. S. 581; 158 id. 601; *Hancock* v. *Singer Manufacturing Company,* 62 N. J. L. 289, 342; *Opinion of the Justices,* 220 Mass. 613, 623.) That might be important in reference to some questions, *as for instance if we were considering the legality of a tax on income, there being a constitutional prohibition against such tax on the principal.* Our problem here, however, is one of statutory construction," etc. (Italics ours.)

CONCLUSION.

The case should be dismissed for the want of a Federal question; or, if retained, the order and judgment of the Supreme Court of the State of New York should be affirmed.

Respectfully submitted,

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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1933. No. [redacted] 1

THOMAS M. LYNCH, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commissioners of the State of New York,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK, upon the relation of ELIZABETH G. PIERSON,

Respondent.

MOTION ON BEHALF OF THE COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE,* AND BRIEF.

SETH T. COLE,
Counsel for Amicus Curiae.

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